RP-1999-0058

IN THE MATTER OF the *Ontario Energy Board Act*, 1998, S.O. 1998, c.15 (Sched.B);

AND IN THE MATTER OF a Complaint referred to the Ontario Energy Board by the Heating, Ventilation and Air Conditioning Contractors Coalition Inc. under section 2.9 of the Affiliate Relationships Code for Gas Utilities;

AND IN THE MATTER OF an Application by The Consumers' Gas Company Ltd. for certain exemptions from the Affiliate Relationships Code for Gas Utilities.

BEFORE: Sheila K. Halladay
Presiding Member

George A. Dominy
Vice-Chair and Member

DECISION WITH REASONS

2000 October 23

TABLE OF CONTENTS

1. INTRODUCTION

1.1 THE APPLICATION AND THE COMPLAINT

1.1.1 On July 20, 1999 The Consumers' Gas Company Ltd., carrying on business as Enbridge Consumers Gas ("ECG" or the "Company"), applied to the Ontario Energy Board (the "Board") for a blanket exemption from the Affiliate Relationships Code for Gas Utilities (the "Code"). The exemption related to support that ECG, the regulated utility, intended to provide to Enbridge Services Inc. ("ESI") in connection with the transfer of certain retail and service businesses from ECG to ESI.

1.1.2 On September 21, 1999 the Heating, Ventilation and Air Conditioning Contractors Coalition Inc. ("HVAC" or "HVAC Coalition") referred a complaint against ECG to the Board under section 2.9 of the Code. The complaint related to ECG's conduct during the separation and removal or "unbundling" of ECG's retail and service businesses. The Board assigned file number EB-1999-0518 to the complaint (the "Complaint" or the "HVAC Complaint").

1.1.3 On November 10, 1999 the Board advised ECG that the Board was not prepared to grant a blanket exemption, noting that ECG had not provided sufficient specific concerns and had not cited specific sections of the Code from which it would require exemptions.

1.1.4 On December 7, 1999 ECG applied, this time under section 1.6 of the Code, for the following exemptions:

- An exemption from sections 2.5.1 and 2.5.2 of the Code to the extent necessary to enable ECG to provide call centre support to ESI until January 31, 2000 in relation to rental inquiries and service requests; and

- An exemption from sections 2.2.3, 2.2.4, 2.5.1, and 2.5.2 of the Code to the extent necessary to enable ECG to loan customer support personnel ("CSP") to ESI until January 31, 2000 in relation to the operations of ESI's call centre.

The Board assigned file number EB-1999-0517 to this application (the "Exemption Application").

1.1.5 The Board issued a Notice of Application and Notice of Written Hearing (the "Notice") on December 16, 1999. The Notice provided that the Board would proceed with both the Complaint and the Exemption Application by way of a written hearing and that the Board would hear both at the same time. The Notice indicated that the Board intended to treat evidence admitted in the Complaint as evidence admitted in the Exemption Application and evidence admitted in the Exemption Application as evidence admitted in the Complaint. The Notice also directed HVAC and ECG to file their initial evidence and argument with regard to the Complaint and Exemption Applications, respectively, by January 7, 2000.

1.1.6 At the request of HVAC, the Board subsequently extended the date for filing initial evidence and argument for both HVAC and ECG to January 17, 2000.

1.1.7 On January 20, 2000 the Board issued Procedural Order No. 1 setting February 3, 2000 as the date by which (i) HVAC and intervenors were to file evidence and argument relating to the Exemption Application; and (ii) ECG and intervenors were to file evidence and argument with respect to the Complaint. Procedural Order No. 1 also set February 17, 2000 as the date by which ECG and HVAC were to file reply evidence and argument.

1.1.8 On January 31, 2000 the Board issued Procedural Order No. 2 setting February 10, 2000 as the date by which intervenors were to file argument with respect to the jurisdiction of the Board to enforce the Code.

1.1.9 By letter, dated February 2, 2000, the Coalition of Eastern Natural Gas Aggregators and Sellers ("CENGAS") requested late intervenor status in the Exemption Application and the Complaint, as well as the right to cross-examine an individual who had sworn an affidavit in connection with the Exemption Application. On February 3, 2000, at the request of ECG, the Board extended the February 3, 2000 filing deadline to February 7, 2000 and indicated that it would establish new times for filing once it determined how to proceed with respect to the requests that had been made by CENGAS.

1.1.10 The Board granted CENGAS late intervenor status and on February 24, 2000 the Board issued Procedural Order No. 3 setting March 3, 2000 as the date by which (i) intervenors were to file argument with respect to the jurisdiction of the Board to enforce the Code; and (ii) CENGAS was to file its evidence and argument with respect to the Exemption Request and Complaint. Procedural Order No. 3 also

established March 10, 2000 as the date by which ECG and HVAC were to file reply evidence and argument.

1.1.11 On March 6, 2000, in response to a request by HVAC for an extension, the Board issued Procedural Order No. 4, setting March 17, 2000 as the date for ECG and HVAC to file reply evidence and argument. At the request of ECG, the Board subsequently extended the date for filing reply evidence and argument to March 24, 2000.

1.1.12 The following parties intervened in the proceeding and made submissions in relation to the Exemption Request and/or the Complaint:

Enbridge Consumers Gas

Heating, Ventilation, Air Conditioning Contractors Coalition Inc.

Sunoco Inc.

Vulnerable Energy Consumers Coalition ("VECC") comprising of the Ontario Coalition Against Poverty and the Ontario Coalition of Senior Citizen's Organizations

Enbridge Services Inc.

Consumers' Association of Canada ("CAC")

Industrial Gas Users Association ("IGUA")

1.1.13 The following parties intervened in the proceeding but did not make submissions:

Natural Resource Gas Limited

Ontario Hydro Services Company (now Hydro One Inc.)

Union Gas Limited

Energy Probe Foundation

Coalition of Eastern Natural Gas Aggregators and Sellers ("CENGAS")

1.1.14 Copies of all the evidence, exhibits and argument in the proceeding are available for review at the Board's offices. While the Board has considered all of the evidence and submissions presented in this proceeding, the Board has chosen to reference these only to the extent necessary to clarify specific issues on which it has made findings.

2. THE EXEMPTION APPLICATION

2.1 BACKGROUND TO THE EXEMPTION APPLICATION

2.1.1 Effective October 1, 1999 ECG transferred the following retail and services businesses to its affiliate, ESI:

- merchandise sales program,
- rental program,
- heating parts replacement program (also known as "HIP" or HIP PLUS"),
- customer maintenance program,
- customer appliance repair service,
- diagnostic service, and
- merchandise finance plan.

2.1.2 ECG submitted that this transfer accomplished the separation and removal or "unbundling" of the retail and services businesses from ECG's utility operations and, in the case of the merchandise finance plan, from non-utility operations.

2.1.3 Section 1.6 of the Code provides, in part, as follows:

> 1.6 ... The Board may grant exemption to the rules set forth in this Code. An exemption may be made in whole or in part and may be subject to conditions or restrictions. In determining whether to grant an exemption, the Board may proceed without a hearing or by way of an oral, written, or electronic hearing.

2.1.4 In connection with these unbundling activities, ECG has applied for the following two exemptions from the Code:

- an exemption from sections 2.5.1 and 2.5.2 of the Code to the extent necessary to enable ECG to provide call centre support to ESI, until January 31, 2000 in relation to rental inquiries and service requests ("Call Centre Support"); and

- an exemption from sections 2.2.3, 2.2.4, 2.5.1 and 2.5.2 of the Code to the extent necessary to enable ECG to loan customer support personnel ("CSP") to ESI, until January 31, 2000, in relation to the operation of ESI's call centre ("Loan of CSP").

2.1.5 Effective January 1, 2000 both ECG and ESI began procuring customer care, information technology, and fleet management services from Enbridge Commercial Services Inc. ("ECS"), a wholly-owned direct subsidiary of Enbridge Inc. As a result of these outsourcing arrangements after December 31, 1999 ECG stopped providing customer care services, including billing, credit and collection, and call centre and related support to ESI.

2.1.6 ECG subsequently advised the Board that since the transfer of the services to ECS occurred on January 1, 2000, earlier than was originally anticipated, the exemption would only be required for the period from October 1, 1999 to December 31, 1999 (the "Transition Period").

2.2 CALL CENTRE SUPPORT

2.2.1 ECG advised the Board that the transfer of the rental business from ECG to ESI was more complex than ECG had first envisaged. There was the need to segregate customer information for the rental business from customer information for gas sales and distribution services, and to integrate the information into ESI's new database.

2.2.2 According to ECG, at the time of unbundling ESI did not have the customer information for ECG nor the supporting infrastructure of its own that were necessary to handle rental service inquiries. ESI's call centre did not become operational until October 15, 1999.

2.2.3 ECG advised the Board that during the Transition Period rental customers would continue to call ECG's call centre with service inquiries. In these circumstances, ECG's CSP answered telephone inquiries from rental customers and, if service was required, ECG's CSP would book service appointments with customers, complete service work orders, and forward the orders to ESI by means of a semi-automated procedure. ESI would perform the work.

2.2.4 ECG requested exemptions from the following provisions of the Code to the extent necessary to provide this call centre support during the Transition Period:

> 2.5.1 A utility shall not preferentially endorse or support marketing activities of an affiliate that is an energy service provider. A utility may include an affiliate as part of a listing of alternative service providers, but the affiliate's name shall not in any way be highlighted.
>
> 2.5.2 A utility, including its employees and agents, shall not state or imply to consumers a preference for any affiliate who is an energy service provider.

2.2.5 In general terms, section 2.5.1 of the Code precludes ECG from preferentially endorsing or supporting the marketing activities of ESI; as well, section 2.5.2 of the Code precludes ECG from stating or implying to consumers a preference for ESI.

2.2.6 According to ECG, all of ECG's CSP received training in relation to the Code, including suitable responses to rental service inquiries. ECG took the position that while its conduct may be a technical violation of the Code, it was not contrary to the intent of the Code.

2.2.7 HVAC questioned why ECG provided its own call centre as the interface between ESI and ESI's own customers. HVAC was also concerned that ECG's reasons for transferring the rental program on October 1, 1999 were for tax and other purposes. HVAC argued that these are shareholder issues, not customer, ratepayer, or Board issues.

2.2.8 HVAC pointed out that section 1.1 of the Code, in part, sets out the following purpose, principal objective and standards:

> The purpose of the Affiliate Relationships Code is to set out the standards and conditions for the interaction between gas distributors, transmitters and storage companies and their respective affiliated companies. The principal objective of the Code is to enhance a competitive market while saving ratepayers harmless from the actions of gas distributors, transmitters and storage companies with respect to dealings with their affiliates. The standards established in the Code are intended to:
>
> > (a) minimize the potential for a utility to cross-subsidize competitive or non-monopoly activities;
> >
> > (b) protect the confidentiality of consumer information collected by a transmitter, distributor or storage company in the course of provision of utility services; and

> (c) ensure there is no preferential access to regulated utility services.

2.2.9 HVAC submitted that the relevant consideration for the Board was whether the activities engaged in by ECG, and for which exemptions were sought, were in breach of the Code, and, if so, what was the effect of the breach.

2.2.10 According to HVAC the relevant consideration in terms of "effect" of a breach of the Code is dictated by the dual purpose of section 1.1 of the Code: the enhancement of the competitive market, and saving ratepayers harmless.

2.2.11 HVAC submitted that during the Transition Period ECG was acting as the interface between rental customers and ESI. From rental customers' perspectives they would call the "gas company" and "Enbridge" technicians would come to their homes. In HVAC's opinion this amounted to preferential endorsement and implied preference by ECG for ESI contrary to sections 2.5.1 and 2.5.2 of the Code.

2.2.12 HVAC stated that its evidence indicates that ECG's call centre support of the services of ESI confused customers and harmed the competitive integrity of the energy services marketplace.

2.2.13 HVAC's position was that if the Board finds that ECG was in technical breach of the Code, but that the breach had no detrimental effect in respect of these two Code purposes, then the exemptions should be retroactively granted. If the Board finds that either or both of these Code purposes have been compromised by ECG's activities, then the Board should consider what conditions to impose under section 1.6 of the Code in order to remedy the detrimental effects.

2.2.14 Sunoco argued that ECG had other options: ECG could have postponed the transfer until ESI was in a position to carry on the business, or alternatively ESI could have purchased CSP services in the market. Both of these options would have been consistent with the Code.

2.2.15 Sunoco stated that, contrary to the representations made in the Exemption Application, ECG did not transfer service requests to ESI; rather ECG processed ESI's service requests itself. As a result, ECG was processing service calls for ESI. Not only was this inconsistent with ECG's representation to the Board that customers would be transferred to ESI, personnel who would book service calls, but it led to the inevitable customer confusion over the respective roles of the utility and its affiliate. This confusion manifested itself in customers swarming ECG with telephone calls when technicians booked by ECG did come to customers' homes.

2.3 LOAN OF CSP

2.3.1 ECG advised the Board that during the Transition Period, ESI received an unusually large volume of service calls and also experienced unanticipated technical difficulties in the processing of service requests, that gave rise to repeated calls.

2.3.2 In order to help rectify this problem, ECG "loaned" CSP to ESI on a temporary basis. The loaned CSP either worked in ESI's call centre, where they dealt with customer inquiries, or assisted ESI in rectifying technical difficulties in processing service requests.

2.3.3 ECG advised the Board that this problem was exacerbated by unanticipated technical problems in ESI's systems and procedures for dispatching service personnel. These problems gave rise to repeat calls. Since callers could not always get through to ESI's call centre, in many cases callers decided to call ECG. From ECG's perspective these were unexpected calls and, according to ECG, it became concerned that emergency calls might not get through to ECG's call centre as promptly as would otherwise be the case. ECG's position was that the best way of solving its own call centre problem was by solving ESI's problem and thereby eliminating "default" calls. Therefore ECG "loaned" CSP to ESI on a temporary basis.

2.3.4 The seconded CSP included not only CSP, who worked in ESI's call centre, but also supervisors for the seconded CSP and technical employees, who were working to solve ESI's technical problems. ECG estimated that during the period from mid-October to December 31, 1999 the number of people "loaned" by ECG to ESI ranged from 30 to 90 people.

2.3.5 Sunoco argued that these problems were of ECG's own making and were a foreseeable and expected outcome of ECG booking calls on behalf of ESI, since customers would be confused about the respective role of ECG and ESI. Sunoco argued that it was ECG's violation of the Code which led to the problem of default callers.

2.3.6 Sunoco submitted that ECG's practices constituted a course of conduct in which ECG subordinated the importance of complying with the Code to its desire to assist its affiliate. It was argued that ECG knew that ESI was not prepared to operate in October, 1999, but it decided to proceed with the unbundling in any event, rather than wait until compliance with the Code was possible. Sunoco noted that after representing to the Board that ECG would only transfer service calls to ESI, it

processed ESI's service orders directly, causing customer confusion over the respective roles of the utility and its competitive affiliate. Finally, when customers, whose service appointments were not kept contacted ECG, ECG lent its CSP to ESI; again choosing to assist ESI rather than compliance with the Code. Furthermore, these CSP accessed confidential information.

2.3.7 Sunoco argued that the letter and spirit of the Code are neither mutually exclusive, nor isolated elements; rather they are complementary and serve as mutual support. A violation of the letter of the Code will be a positive indication of the violation of the spirit of the Code.

2.3.8 ECG stated that prior to commencing work at ESI, ECG's CSP were instructed to represent themselves as ESI's employees and were trained with respect to the requirements of the Code. Therefore from a customer's perspective the CSP "loaned" from ECG were not distinguishable from ESI's own CSP.

2.3.9 In connection with the loan of these CSP to ESI during the Transition Period, in addition to exemptions under section 2.5.1 and 2.5.2 of the Code, ECG also requested exemptions from sections 2.2.3 and 2.2.4 of the Code, which provide as follows:

> 2.2.3 A utility may share employees with an affiliate provided that the employees to be shared are not directly involved in collecting, or have access to, confidential information.
>
> 2.2.4 A utility shall not share with an affiliate that is an energy service provider any employee who controls the access to utility services, or directs the manner in which utility services are provided to customers, or who has direct contact with a customer of the utility service.

2.3.10 ECG conceded that ECG's loaned CSP were able to obtain access to ECG's customer information while on duty in ESI's call centre, but submitted that they were instructed to do so only in the following two situations: first, when responding to inquiries made by Heating Parts Replacement Plan (HIP or HIP Plus) customers where ESI's database was incomplete because, in ECG's submission, ECG had transferred incomplete information for many of these customers; and secondly, to respond to inquiries that were intended for ECG but were misdirected to ESI's call centre. ECG contended that this saved the customer the inconvenience of making another call to ECG.

2.3.11 ECG's position was that it is inconceivable that the loaned CSP and supervisory personnel took confidential information on ECG's approximately 1.4 million customers with them. In addition, ECG pointed out that while the CSP were on duty at ESI's call centre, their access to ECG's confidential information was not only limited, but also used only for the purposes of responding to customer inquiries.

2.3.12 HVAC argued that this call centre support confused customers and harmed the competitive integrity of the energy services marketplace.

2.4 BOARD FINDINGS ON THE EXEMPTION APPLICATION

2.4.1 The Board recognizes that until October 1, 1999 ECG operated the competitive rental and other services businesses within the same corporate entity as the regulated utility. The Board notes that ECG's decision to transfer the rental and services businesses to its affiliate, ESI, and the timing of that transfer were solely in ECG's discretion.

2.4.2 The Board notes that the Code is an end-state rule of conduct. It was anticipated that there may be circumstances when a utility might legitimately require an exemption from the strict compliance with the Code. That is why the Code provides for a mechanism for the Board to grant exemptions.

2.4.3 The Board refused to give ECG the blanket exemption that it originally requested from the provisions of the Code for its actions during the Transition Period. The Board, however, notes that the exemptions requested by ECG in the Exemption Application are limited to two specific activities, call centre support and loaning of CSP, and are of a limited 3 month duration.

2.4.4 The Board appreciates that, during the Transition Period, ECG incurred practical difficulties in unbundling the rental and services businesses from regulated utility services. The Board notes that many of these problems were of ECG's own making. While the Board is not convinced that ECG's actions were the only, or even the best, solution to these difficulties, the Board is likewise not convinced that ECG's actions were unreasonable under the circumstances.

2.4.5 In determining whether to grant the exemption, one of the Board's primary concern is protection of the ratepayer. The Board is concerned ratepayers should not be adversely affected as they are transferred from being rental and services customers of ECG to being customers of ESI. During the transition, customers must be protected and reassured that the services that were once provided by ECG are still available. The Board is not convinced that by the granting of this exemption for specific activities for the limited three month Transition Period the actions of ECG would have an undue effect of curtailing the development of a competitive market.

2.4.6 On balance, the Board finds that the actions taken by ECG during the Transition Period, as more specifically set out in the Exemption Application, were reasonable under the circumstances to protect the customers during the transfer of the rental and other services businesses from ECG to ESI. The Board would have granted ECG the exemptions it requested; however, since the time for which the exemptions were requested has expired, the granting of the Exemption Application may now be moot.

2.4.7 The Board expects ECG to comply with the provisions of the Code in the future. The issue of whether the actions taken by ECG go beyond the limited exemptions from the Code requested by ECG, as set out in the Exemption Application, is addressed later in this Decision.

3. JURISDICTION

3.0.1 ECG raised four arguments with respect to the Board's jurisdiction in the HVAC Complaint:

- The Code is itself beyond the jurisdiction of the Board to the extent that it regulates the conduct of ECG with respect to competitive energy services, other than the sale of gas.
- The Board can only regulate the actions of the utility and not the "interaction" between the utility and its affiliates.
- The Board does not have the jurisdiction to hold a hearing to consider the HVAC Complaint.
- There are no remedies which the Board can impose on a gas utility for a breach of the Code. The only possible remedy in the Act is a fine imposed as a result of a conviction for committing an offence under the Act.

3.1 JURISDICTION TO MAKE THE CODE

3.1.1 The Code is a rule made by the Board under the authority of clause 44(1)(a) of the Act, which provides that the Board may make rules,

> governing the conduct of a gas transmitter, gas distributor or storage company as such conduct relates to its affiliates.

3.1.2 As noted above, section 1.1 of the Code describes the principal objective of the Code as,

> to enhance a competitive market while saving ratepayers harmless from the actions of gas distributors, transmitters and storage companies with respect to dealings with their affiliates.

3.1.3 The Code does not specifically define the "competitive market" to be enhanced; however, section 1.2 of the Code defines "energy service provider" as

> a person, other than an exempt utility, involved in the supply of electricity or gas or related activities, including retailing of electricity, marketing of natural gas, generation of electricity, energy management services, demand-side management programs, and appliance sales, service and rentals.

3.1.4 The substantive provisions of the Code limit the actions that a utility can take with respect to an affiliate which is an energy service provider.

3.1.5 ECG submitted that the Board's rule-making authority is limited and that the Code must be interpreted in a way that comports with the Board's objectives under section 2 of the Act.

3.1.6 ECG argued that the broad definition of "energy service provider" in the Code would include affiliates engaged in virtually all energy services. ECG submitted that the Board cannot use the Code as a means of enhancing competition in virtually all energy services but is limited, by virtue of section 2 of the Act, only to "facilitate competition in the sale of gas to users".

3.1.7 ESI also argued that the Board has no jurisdiction to regulate competition other than relating to facilitating "competition in the sale of gas to users". There is no jurisdictional basis in the Act which would permit the Board, through the implementation or enforcement of the Code, to act as a "regulator" of competition in the energy services sector.

3.1.8 HVAC, CAC and VECC each noted that the Divisional Court in *Alliance Gas Management Inc. v. Ontario Energy Board*, [1999] O.J. No 4852 (unreported) held that :

> Section 44(1)(c) [and thus by implication 44(1)(a)] is not subordinate in any way to other sections of the Act and must be given its full meaning.

3.1.9 HVAC suggested that the express listing of certain objectives for the Board in section 2 of the Act does not reduce the Board's general public interest mandate. Section 44 of the Act does not expressly restrict the power of the Board to making rules only in relation to affiliates selling natural gas.

3.1.10 CAC argued that ECG's analysis is wrong for a number of reasons: it places a disproportionate emphasis on the listed objectives; it ignores the plain meaning of section 44 of the Act; and it ignores the scheme of the Act as a whole.

3.1.11 CAC submitted that the statements of objectives provide a guide to the interpretation of the legislation and how the powers of a regulatory agency are to be interpreted and are not limiting in the sense that the Board may not have regard to other objectives. The weight to be given to a purpose statement depends on a number of considerations, including, among other matters, whether there are other indicators of legislative purpose. Purpose statements, being really descriptive of the Legislature's goals, carry less weight than substantive provisions. CAC argued that the effect of

ECG's argument is to place a disproportionate weight on the purpose clause generally and one of the listed objectives in particular.

3.1.12 CAC submitted that ECG's argument ignores the scheme as a whole. The Legislature has granted very broad powers to the Board to govern the conduct of the utility in relation to its affiliates and did not define what affiliate activities are to be included. While the Board cannot regulate the activities of the affiliates, it can create codes of conduct with the objective to ensure that monopoly power is not abused, regardless of the activities of the affiliate.

3.1.13 VECC argued that promoting competition in other energy services also promotes competition in gas sales given the inter-related nature of these markets. VECC also argued that preferential treatment of an affiliate, such as highlighting its name or giving referrals without compensation, is an implicit subsidy of the affiliate by the utility and so is captured in the Board's mandate to maintain just and reasonable rates.

Board Findings

3.1.14 Section 2 of the Act states that the Board is to be "guided" by the listed objectives. It is clear that the Board must consider these objectives in carrying out its statutory duties; however, the objectives set out in section 2 are not an exhaustive list of all of the goals that the Board may consider. The Board has a broad public policy mandate to regulate the conduct of monopoly utilities in the public interest.

3.1.15 A role of the Board in enhancing the competitive energy services marketplace is to ensure that the utility does not use its dominant position in the storage, transmission, and distribution of gas to frustrate the development of a competitive market in other non-regulated energy services.

3.1.16 The Board finds that it has jurisdiction to make the Code.

3.2 THE INTERACTION OF THE UTILITY AND ITS AFFILIATES

3.2.1 Section 1.1 of the Code describes the purpose of the Code:

> to set out the standards and conditions for the interaction between gas distributors, transmitters and storage companies and their respective affiliated companies.

3.2.2 ECG argued that the Board cannot regulate the "interaction" between the utility and its affiliates but can only regulate the actions of the utility. Clause 44(1)(a) of the Act allows the Board to make rules governing the "conduct" of the utility as such conduct "relates" to an affiliate. The use of the word "conduct" in this context limits the Board's rule-making authority to the manner in which a utility conducts its business in relation to its affiliates. Its authority does not extend to the manner in which an affiliate conducts its business.

3.2.3 ECG submitted that the purpose of the Code is inconsistent with clause 44(1)(a) of the Act because the reference to "interaction" in the first sentence contemplates reciprocal actions; that is the action or conduct of an affiliate, as well as of a gas utility.

3.2.4 CAC pointed out that there are three critical points about this regulatory and policy framework: the Legislature believed that rules governing the conduct of utilities in relation to their affiliates were sufficiently important to create a specific power authorizing the making of such rules; the power to make rules was given to the Board in its capacity as the expert agency; and the Legislature put few constraints on the power of the Board to develop and implement the rules which the Board feels are necessary.

3.2.5 CAC noted that the issue is not whether the Code governs the conduct of ECG, but whether, by necessary implication, it also governs the conduct of ECG's affiliates and its parent. CAC argued that the danger is that if the conduct of affiliates and parents is not governed by the Code, the effects of the Code will be substantially weakened. If a utility's affiliates and its parent can violate the Code with impunity, the purposes of having the rules, and the intention of the Legislature in authorizing the Board to make rules, would be defeated.

3.2.6 CAC submitted that it is important to emphasize that, as set out in section 1.1 of the Code, the "principal objective" of the Code is to "enhance a competitive market". The Code is also intended to protect the interests of consumers in three specific areas: to minimize the potential for a utility to cross–subsidize competitive or non-monopoly activities; to protect the confidentiality of consumer information collected by a utility; and to ensure that there is no preferential access to regulated utility services. CAC expressed overall concern that if ECG's position on jurisdiction were accepted, then the Code would, for all intent and purposes, be meaningless.

3.2.7 The combination of the deregulation of the sale of natural gas and the unbundling by the utilities of "ancillary services" has created an opportunity for abuse of monopoly power by the utility. This is particularly the case in the market for ancillary services. CAC submitted that while the utility's affiliate entered a well-developed, highly competitive market for the sale of natural gas, the affiliates providing ancillary services are entering a market that is undeveloped, has few competitors, and is dominated by the utilities.

3.2.8 CAC noted that the legislation recognized the need for rules to govern the relationships between utilities and their affiliates if the risk of abuse of monopoly power was to be controlled and the market to develop effectively. As a result the legislation gave the Board power to make rules, among other things, governing the conduct of the gas utilities as such conduct relates to their affiliates. The power set out in section 44 of the Act is a very broad one and allows the Board to develop whatever rules it feels are appropriate to govern that conduct.

3.2.9 CAC argued that while the Code explicitly governs the conduct of ECG, by "necessary implication" it also governs the conduct of ECG's parent and its affiliates by virtue of their relationship to the regulated entity and by virtue of the objectives that the Code is intended to accomplish.

Board Findings

3.2.10 The Board finds that the Code is within the jurisdiction of the Board. The Code does not directly regulate a utility's competitive, unregulated affiliate. The Code only regulates the activities of the regulated utility, including the conduct of the utility as it relates to both its regulated and unregulated affiliates.

3.3 JURISDICTION TO HEAR THE COMPLAINT

3.3.1 Section 2.9.6 of the Code provides that the complainant may refer an unresolved complaint to the Board. The Code does not specify a procedure for such complaint referral.

3.3.2 ECG submitted that the Board does not have jurisdiction to adjudicate the HVAC Complaint since the rule-making provisions contained in sections 44 and 45 of the Act are silent and do not expressly provide the Board with original jurisdiction to hear a complaint. In addition, the Code itself does not address the procedure to be followed by the Board once a complaint has been received.

3.3.3 Subsection 19(1) of the Act provides that the Board has "in all matters within its jurisdiction authority to hear and determine all questions of law and fact." It was ECG's position that subsection 19(1) of the Act does not provide the Board with original jurisdiction to treat a complaint under a Code as, in effect, an application for relief made by the complainant.

3.3.4 ECG stated that this position is supported by a letter to ECG from the Assistant Board Secretary, dated June 22, 1999, which indicates, in relation to a different matter, that it was the position of the Board that section 19 of the Act does not, in and of itself, provide a jurisdictional foundation for commencing a hearing.

3.3.5 HVAC noted that the comments of the Board with respect to its authority under section 19 of the Act were in response to an application by ECG to an alleged breach by a gas marketer of the Code of Conduct for Gas Marketers (the "Gas Marketers Code"). The Gas Marketers Code does not contain a provision referring complaints to the Board and HVAC noted that the licensing of gas marketers gives the Board another vehicle for enforcement of the Gas Marketers Code.

3.3.6 ECG noted that there is an alternative enforcement procedure set out in sections 121 through 125 of the Act. ECG suggested that the appropriate process would be for the director of licensing (the "Director") to investigate alleged contraventions of the

Code and commence a prosecution where there are reasonable and probable grounds to believe an offence has been committed.

3.3.7 HVAC dismissed ECG's position as to the proper Code enforcement process as "extremely strained". HVAC asserted that the Board has jurisdiction to make the Code and that section 19 of the Act gives the Board authority to " hear and determine all questions of law and fact" with respect to the rules in the Code.

3.3.8 CAC submitted that there is nothing in the Act or the Code, which directly or by necessary implication precludes the Board from adjudicating a complaint, and it is clear from the scheme of the Act and from the regulatory and policy context in which it was created, that the intention of the Legislature was that the Board determines whether the Code has been breached and that it makes the appropriate order based on that determination.

Board Findings

3.3.9 Section 2.9.6 of the Code permits a complainant to "refer the complaint to the Board". Implicit in this language is that if the parties are unable to resolve the complaint, through mediation or some other alternative dispute resolution procedure, the Board must ultimately be able to determine the validity of the complaint.

3.3.10 Since the Board's determination of whether there has been a breach of the Code may affect the legal rights of the gas utility, and perhaps others, in order to comply with the rules of natural justice, procedural fairness dictates that the Board must give the parties an opportunity to be heard.

3.3.11 The Board finds that it has jurisdiction to determine whether there is merit in the HVAC Complaint and to proceed by way of a hearing in making that determination.

3.4 JURISDICTION TO IMPOSE REMEDIES

3.4.1 HVAC requested that if the Board found that ECG had breached the Code that the Board grant the following relief:

- That the Board direct ECG to: develop and implement a customer communication plan which provides unbiased and clear explanation of the distinction between ECG and ESI, and of the distinction between utility services provided by the former and non-regulated competitive services provided by the latter; submit such customer communication plan to the Board for approval; circulate such customer communication plan to the parties, which parties shall be provided with opportunity to submit comments to the Board on the plan prior to the Board's approval of the plan and refrain from any customer communication not in accord with the Board approved plan.

- That the Board direct ECG to cease inclusion of ESI charges on the ECG gas bill.

- That the Board direct ECG to cease directing callers for unregulated service, either by way of direct connection or provision of ESI's name or phone number, except for providing ESI's name and phone number (but not a direct connection) to callers who were ECG rental, maintenance, protection plan, or financing plan customers and who are calling in relation to their ECG contracts during the currency of those contracts.

- That the Board direct ECG to: immediately perform a Code compliance review; publicly file a report on such compliance review within 30 days of the date of the Board's order; provide copies of this compliance review report to all parties to this proceeding.

3.4.2 ECG argued that HVAC's prayer for relief is expressed in terms of directives; that is, the Board would direct ECG to do, or to refrain from doing, the acts or things. Since these directives would presumably be embodied in an order or orders issued by the Board it was ECG's position that HVAC was essentially requesting the Board to issue mandatory or prohibitory orders.

3.4.3 ECG pointed out that, unlike courts of superior jurisdiction, the Board has no inherent power to grant equitable relief, such as a declaratory judgement or an injunction of either a mandatory or a prohibitory nature. ECG submitted that the Act does not expressly give the Board a general power to make mandatory or prohibitory orders and, in particular, the Board does not have express specific powers under sections 44 and 45 of the Act to impose a remedy for breach of the Code. ECG noted that the *Statutory Powers Procedure Act* does not provide the Board with any additional powers in this regard.

3.4.4 ECG argued that HVAC's claim seems to imply that the Board has a general public interest jurisdiction and that the Board can (and should) exercise such jurisdiction in order to grant HVAC's prayer for relief. ECG submitted that, absent clear and express words in its enabling legislation, a statutory tribunal has no general public interest jurisdiction.

3.4.5 ECG submitted that this is not to say that the Board's decisions or orders should not be informed by the public interest. Indeed the Board is required to have regard for the public interest in its decision-making process. It does not follow, though, that the Board can build "regard for the public interest" into a jurisdictional foundation for a general power to make any order that it considers necessary in the public interest.

3.4.6 ECG also noted that powers conferred on a statutory tribunal by its enabling legislation include not only such powers as are expressly granted but also, by implication, all powers that are "reasonably necessary" to accomplish the objects secured by the legislation.

3.4.7 ECG pointed out that what is reasonably necessary by implication has been the subject of considerable jurisprudence. The case law indicates that a determination of what, if any, powers are reasonably necessary requires a careful consideration of the following factors: the particular legislative and regulatory context, including the purpose and scope of the enabling legislation; the nature and extent of the powers that are expressly conferred on the tribunal; and the nature and extent of the powers that are sought to be implied.

3.4.8 ECG argued that there is a two-pronged test as to when courts will imply a power: there must be a practical necessity to do so; and there must be a jurisdictional foundation to support the implication. Courts will not invoke the doctrine of implied jurisdiction when there is no practical need to do so or where there is no jurisdictional foundation to support the implied power.

3.4.9 ECG also pointed out that courts are reluctant to imply a power where the enabling legislation has prescribed an alternative mechanism for dealing with the matter at issue. In addition, courts have regarded the nature of the power sought to be implied, such that they are reluctant to imply judicial powers that have traditionally been exercised by superior courts in accordance with their inherent jurisdiction.

3.4.10 As noted above, ECG submitted that the mandatory and prohibitory orders requested in HVAC's prayer for relief are akin to mandatory and prohibitory injunctions. Injunctive relief is the traditional preserve of the superior courts by virtue of their inherent jurisdiction. Since the Act does not expressly confer these powers on the Board, it must be presumed that the Legislature conferred only those powers ordinarily exercised by statutory tribunals, rather than superior courts, and the Board should (and the courts would) accordingly refrain from implying a power to make such orders in relation to the Code.

3.4.11 ECG agreed with CAC, VECC and HVAC that it cannot be reasonably argued that neither the legislation nor the Code itself contemplates that the Code could not be enforced. ECG, however, pointed to section 126 of the Act which provides that a person who contravenes a rule made under Part III of the Act, such as the Code, is guilty of an offence. An offence under section 126 of the Act is a provincial offence and is subject to the *Provincial Offences Act* (Ontario) ("POA"). ECG argued that the POA provides comprehensive procedural provisions that govern the prosecution of provincial offences. According to ECG the enforcement of the Code in accordance with Part IX of the Act and Part III of the POA would be entirely consistent with the purpose and the express provisions of both the Act and the Code.

3.4.12 ECG noted that there is a distinction, in terms of enforcement measures, between sanctions and remedies. Sanctions are, generally, penalties or other punishments, intended to deal with actual breaches of statutory authority. Remedies are the means available to prevent future breaches or provide redress for actual breaches. Remedies are accordingly prospective; for example, a mandatory order requiring a person to do a particular act, or, conversely, a prohibitory order forbidding a person from doing or continuing to do a particular act.

3.4.13 HVAC argued that implied in the rule-making power is that the Board has the jurisdiction to enforce its own rules. Therefore a necessary implication of the rule-making power is the power of the Board to determine whether the rules have been breached. Also inherent is the Board's jurisdiction to make an order requiring the gas distributor to comply with the rules and to determine what is necessary for the gas distributor to comply with the rules.

3.4.14 HVAC pointed out that the Board has been given the power to make rules "governing" the conduct of the utility and that this governance of the utility is the "object"intended to be secured by the legislation. HVAC argued that enforcement powers are reasonably necessary to secure the object of "governing" the conduct of the utility.

3.4.15 CAC submitted that the mere existence of the rules is not sufficient to accomplish the goals of the Legislature. If the rules are to have their intended effect there must be a mechanism for their enforcement, which is flexible and responds quickly to changing market conditions. It would defeat the intention of the Legislature and the purpose for having rules if they could not effectively be enforced.

3.4.16 CAC noted that while ECG's argument focuses primarily on HVAC's prayer for relief and in particular on HVAC's request for "mandatory orders", underlying ECG's argument is a more fundamental attack on the ability of the Board to enforce the Code at all.

3.4.17 CAC noted that ECG participated in the development of the Code and at no point did ECG argue that the Board could not enforce the Code. ECG said that it would voluntarily comply with the Code. Given this history, there is a legitimate expectation of the Board, the government and stakeholders that ECG, while it might challenge the

factual basis for the HVAC Complaint, would abide by the Board's determination of the facts and any remedy prescribed by the Board.

3.4.18 CAC submitted that there is nothing in the Act or the Code which directly or by necessary implication precludes the Board from adjudication of a complaint that there has been a breach of the Code. It is clear from the scheme of the Act and from the regulatory and policy context in which it was created, that the intention of the Legislature was that the Board determines whether the Code has been breached and that it makes the appropriate order based on that determination.

3.4.19 CAC agreed that neither the Act nor the Code contains any explicit power for the Board to enforce the Code. The issue is whether it is "reasonably necessary" to imply that the Board has the jurisdiction to enforce the Code in order to secure the purposes of the Act. The fact that other statutes may contain express enforcement powers, in CAC's view, is not determinative. Although courts must refrain from unduly broadening the powers of regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.

3.4.20 It was CAC 's position that the purpose of the Act, and in particular section 44, is to enhance the development of a competitive market and prevent abuse of monopoly power, using the mechanism of rules developed and enforced by the Board. To accomplish the purpose of the Act, it is essential that the rules developed by the Board be enforced effectively, that is by an agency familiar with the relevant markets, and quickly. It would defeat the purpose of the Act if the rules were only enforced many months after the breaches complained of and the harm the rules were to prevent would have long since been done and could not be remedied.

3.4.21 CAC submitted the existence of an alternative mechanism to enforce the Codes does not necessarily mean that the Board does not have enforcement powers. The crucial test is whether the Board reasonably requires the power to enforce the Code if the purposes of the Act are to be achieved.

3.4.22 CAC submitted that while the adequacy of the alternative enforcement mechanism in securing the purposes of the legislation is a relevant consideration, the ability to prosecute for a breach of the Code does not secure the purposes of the Act for a number of reasons: it would run contrary to the clear intention of the Legislature if the Code were to be interpreted and applied solely by someone with no specialized knowledge of the unique characteristics of the developing energy market; the nature of the abuses which the Code seeks to prevent are such that they must be dealt with quickly and effectively; and a fine, even the maximum amount permitted by the legislation, would not be a deterrent to the breaches of the Code since the commercial value derived from abuses of monopoly power far outweighs the costs of a fine.

3.4.23 CAC further argued that it cannot have been the intention of the Legislature to vest broad powers in the Board to develop and implement codes of conduct but preclude any effective means of applying those codes.

3.4.24 HVAC, CAC, VECC and Sunoco each took the position that the Board has an implied power to impose a remedy on a gas utility which breaches the Code. Provincial prosecution before a justice of the peace, without expertise in the energy industry and with only the power to impose monetary penalties, is not an adequate enforcement mechanism. Therefore it is reasonably necessary for the Board to be able to impose remedies for breaches of the Code.

3.4.25 VECC also pointed out that the sanctions available to a prosecution are substantially different from the remedial enforcement tools that a regulator might employ.

3.4.26 ECG responded that refusal to imply such a power would not result in the frustration of the central role of the Board which is, in ECG's submission, the regulation of the sale, transmission, distribution and storage of gas by gas utilities under Part III of the Act.

Board Findings

3.4.27 Clause 44(1)(a) of the Act gives the Board the authority to make rules governing the conduct of a gas transmitter, gas distributor or storage company as such conduct relates to its affiliates. The "governing" of the conduct of the utility is one of the objects to be secured by the legislation.

3.4.28 The Act does not contain an express provision granting the Board jurisdiction to impose a remedy for breach of the Code. The issue therefore is whether it is reasonably necessary to imply such a power in order for the Board to carry out its mandate.

3.4.29 ECG cited a number of cases to support its argument that the power to enforce the Code should not be implied. However, these cases can be distinguished on the basis that they deal with matters ancillary to the regulatory tribunal's central function. For example, in the cases cited by ECG courts have found that it is not reasonably necessary for a regulatory tribunal to have the implied power to award costs, investigate an alleged contempt, refer a matter to arbitration or complete the production of documents outside of a proceeding. In contrast to these cited cases,

the power to enforce the Code is central to the Board's mandate to govern the conduct of the regulated utility.

3.4.30 The power of the Board to make rules is hollow if it does not have an effective enforcement mechanism. The alternate remedy, suggested by ECG, of provincial prosecution before a justice of the peace would not be an effective remedy for a number of reasons as suggested by the parties.

3.4.31 The Board believes that it not only has the jurisdiction to make the Code, it also has the jurisdiction to enforce it.

4. THE HVAC COMPLAINT

4.1 BASIS OF THE COMPLAINT

4.1.1 HVAC alleges that ECG has breached sections 2.5.1, 2.5.2, 2.5.3, and 2.5.6 of the Code and that the cumulative effect of these breaches has amounted to a course of conduct that illustrates a disregard by both ECG and its parent, Enbridge Inc., of both the letter and the spirit of the Code. In particular HVAC alleges that:

- the cumulative effect of individual breaches of the Code by ECG have had the effect of "preferential endorsement" by the utility of and direction of customers to its affiliate, ESI contrary to sections 2.5.1, 2.5.2 and 2.5.3 of the Code;

- the inclusion of ESI's customer charges on the ECG gas bill, as well as being an additional instance of preferential endorsement by the utility of its affiliate, is also in breach of section 2.5.6 of the Code, since the gas bill is a "utility service"; and

- evidence of physical coexistence of the utility and its affiliate, combined with the common "badging" under the new "Enbridge" name and swirled "e" logo,

is in breach of section 2.5.3 of the Code and, in any event, aggravates the effect of the principal breaches of the Code.

4.1.2 Specifically, HVAC raised the following concerns:

- the use of the Enbridge name and logo,
- customer communications,
- the gas bill,
- call centre support, and
- other miscellaneous matters.

4.1.3 In general, ECG responded that HVAC's complaint is ill founded and misguided. ECG denied that it had been engaged in a series of violations, deliberate or otherwise, of the Code. ECG submitted that there is no "course of conduct" and in consequence no "cumulative effect" of preferential endorsement or direction of a customer by ECG to ESI. ECG denied any violation of the Code other than the technical violations set out in the Exemption Application. ECG submitted that HVAC's evidence is not only anecdotal, but also hearsay.

4.1.4 ECG advised the Board that ECG and ESI have each made an outsourcing arrangement with ECS for customer care and other services that became effective on January 1, 2000. ECG noted that customer care services include meter reading, billing, credit and collection, and call centre and related support. Therefore, ECG argued, ECS was responsible for customer care functions, such as call centre and billing.

4.2 USE OF ENBRIDGE NAME AND LOGO

4.2.1 HVAC argued that the "Enbridge" name and swirled "e", "energy spiral" logo are now being used to provide ESI and ECG with a common public identity. While the Code does not include any restrictions on use of the utility name and logo by an energy services affiliate, it does seek to ensure that such use does not mislead customers. The "Enbridge family" branding is also important in the context of considering the allegations of breaches of the Code's prohibition against preferential endorsement and preferential direction of customers.

4.2.2 HVAC submitted that the "Enbridge" branding was developed in anticipation of customer communication pieces and that this rebranding was done largely through the auspices of the utility.

4.2.3 HVAC also alleged that participation by the utility in the use by the affiliate of the utility name, logo (energy spiral) and other distinguishing characteristics (phone numbers and call centre support) in a manner which would mislead consumers as to the distinction between the utility and the affiliate, is contrary to section 2.5.3 of the Code.

4.2.4 ECG advised the Board that Enbridge Inc. owns the "Enbridge" trademarks and has granted ECG a licence to use these trademarks in connection with its utility business in Ontario. ECG stated that Enbridge Inc. has granted other affiliates a similar license to use these trademarks.

4.2.5 ECG argued that since it was not the owner of the Enbridge trademarks, it could not control their use by other members of the "Enbridge" family.

4.3 CUSTOMER COMMUNICATIONS

4.3.1 Starting in July 1999, ECG began a series of publications, including bill inserts, infomercials and direct mail styled as "customer information" pieces. ESI and ECG jointly published an "apology" in the Toronto Star during the week of October 18, 1999.

4.3.2 HVAC submitted that to the extent that the utility feels it appropriate to provide the public with information on changes in the energy service marketplace the Code requires that such information must be provided in a manner that neither highlights nor endorses the utility's energy services affiliate.

4.3.3 HVAC's position was that the effect, if not the intention, of certain ECG customer communications, both individual and cumulative, is to preferentially endorse the marketing activities of ESI contrary to section 2.5.1 of the Code and to imply to consumers a preference for ESI in breach of section 2.5.2 of the Code.

4.3.4 In general, HVAC expressed concern that customer communications by ECG and ESI confused customers by means such as the following:

- using the word "Enbridge" without distinguishing whether they were referring to the regulated utility or unregulated affiliate;
- stating that "Enbridge will continue to provide all the services you have come to count on" without making the distinction between ECG and ESI.;
- referring to the "Enbridge" family; and

- stating that "as always, your energy needs, safety and home comfort remain our top priority" without distinguishing ECG from ESI.

4.3.5 HVAC contended that the thrust of these customer communications was to attempt to transfer the trust and confidence that customers have in the regulated distribution company to the supposedly unsheltered competitive affiliate and that this is precisely the obfuscatory effect that sections 2.5.1 and 2.5.2 of the Code are intended to prevent.

4.3.6 ECG submitted that its customer communication plan is separate and apart from the Enbridge branding campaign, which encompasses the Enbridge name and logo. ECG stated that its customer communication plan was aimed at communicating the transition of the retail and services businesses from ECG to ESI, to ECG's constituency of customers and other stakeholders. ECG noted that its customer communication plan was premised on the principle that ECG would not abandon customers during the course of the unbundling process.

4.3.7 ESI stated that it purchased the services and retail businesses, that are the subject of the HVAC Complaint, as a going concern, including the goodwill associated with the businesses. ESI submitted that goodwill properly includes the customer relationships, contractual or otherwise, associated with those businesses.

4.4 THE GAS BILL

4.4.1 HVAC submitted that the largest impediment to a truly competitive energy services marketplace is the continued billing for rental appliances (which HVAC claims affects in excess of 95% of the ECG franchise territory gas customers) and other "grandfathered' goods and services on the ECG gas bill.

4.4.2 ECS is providing a billing service to both ECG and ESI by means of a single "Enbridge" bill. ECG argued that the bill is not an ECG bill, but an ECS bill and therefore the Board has no jurisdiction to regulate the contents of the bill.

4.4.3 HVAC argued that the way the bill is printed obfuscates rather than clarifies the distinction between the regulated utility and the non-regulated competitive service provided by ESI under the "Enbridge" umbrella.

4.4.4 HVAC pointed out that for an ABC bill the identity of the competitive gas supplier and its direct contact number are printed immediately contiguous to the applicable charge, and the ABC bill message printed at the bottom of the bill re-iterates for the customer that their gas is competitively supplied, and the third party supplier should be contacted directly. In contrast, for an ESI bill, the identification of the competitive supplier is not contiguous to the rental charge but is footnoted, and a direct telephone number and advice regarding direct contact of "Enbridge Services" is not provided.

4.4.5 HVAC also argued that the inclusion of ESI's customer charges on the ECG gas bill constitutes a preferential endorsement by the utility of the affiliate and is also in breach of section 2.5.6 of the Affiliate Code, which provides that "requests by an affiliate ... for utility services shall be processed and provided in the same manner as would be processed or provided for similarly situated non-affiliated parties."

4.4.6 HVAC's position was that since the costs of ECG's billing system are included in the ECG's O&M budget and recovered in rates, these costs are currently an integral part of the provision of gas distribution service; therefore the billing system must be considered a "utility service" as defined in section 1.2 of the Code. As such, ECG must provide equal access to the billing system to all similarly situated non-affiliated

parties. HVAC's position was that HVAC contractors have not been afforded access to ECG's bill.

4.4.7 ECG submitted that the Code defines "utility services" as "the services provided by a utility for which a regulated rate, charge, or range rate has been approved by the Board". ECG submitted that its rate or charge for billing has never been approved by the Board, *per se*.

4.4.8 HVAC expressed the following additional concerns about the new billing package:

- it was enclosed in an ECG envelope;
- it was printed on an "Enbridge" billing sheet;
- it contained the following message below the list of charges: " All items billed on behalf of Enbridge Consumers Gas unless otherwise indicated";
- the bill also contained a footnoted message in respect of the rental water heater charge : "Items billed on behalf of Enbridge Services";
- a rental water heater pamphlet, published by ESI was distributed with the ECG gas bill; and
- the pre-printed envelope for return payment is an ECG envelope.

According to HVAC, this new billing protocol was a further breach of Section 2.5.3 and 2.5.6 of the Code.

4.4.9 HVAC submitted that ECG should be required to ensure, through a services agreement in respect of these outsourced billing services, that the bill sent on behalf of the utility and packaged in a utility envelope with a utility return envelope, reflects only the utility charges, and is sent out on a page with the utility name printed on it.

4.4.10 ECG advised that ECS's use of ECG's remaining inventory of mailing and return envelopes was a one-time event for the purposes of the January billing cycle. ECG's remaining inventory was valued at approximately $80,000 and instead of discarding the inventory ECG transferred the envelopes to ECS. ECG advised that the value of the inventory will be credited against fees payable by ECG for customer care services. ECS is now using "Enbridge" mailing and return envelopes.

4.4.11 ESI submitted that the "Enbridge" corporate family has a basic right to organize its administrative functions in the most economically efficient manner, subject to the proper application of the Code. ESI stated that this right includes the ability to operate one billing system and one call centre and to avoid the duplication of expense associated with operating two of each.

4.5 CALL CENTRE

4.5.1 HVAC submitted that its "evidence ... indicated that the current call centre support by ECG of ESI confuses customers and harms the competitive integrity of the energy services marketplace". It was HVAC's submission that, except for those former ECG customers transferred to ESI and who are calling about their pre-existing contracts, ECG should not be preferentially identifying (and thereby endorsing) or directing or connecting callers to ESI.

4.5.2 HVAC also submitted that the increased complexity of the ECG call centre protocols grafted onto its phone-in system to enable it to act as interface between its energy services affiliate and 1.2 million rental customers degraded the quality of, and accessibility to, utility services available to utility customers.

4.5.3 HVAC argued that the important principle is that an affiliate should not be able to provide its competitive services through the utility's direct relationship with utility customers. HVAC compared this prohibition to the Board's decision in RP-1999-0040, for standard system supply for electricity, where the Board confirmed that the utility must maintain its direct relationship with the customer.

4.5.4 ECG's response was that HVAC's evidence is not nearly as compelling in this regard as the submission implied. ECG argued, for example, there is no apparent evidentiary foundation that call centre support "harms the competitive integrity of the energy services marketplace". ECG also argued that the anecdotal evidence of employees of independent contractors does not substantiate HVAC's submission.

4.5.5 ESI also responded that HVAC has offered no evidence as to the state of competition in the energy services marketplace before ECG's "unbundling" transaction. ESI submitted that HVAC has made no attempt to describe any impact on competition of ESI's activity in the marketplace since October 1999, much less any adverse effects of the alleged Code violations.

4.5.6 ECG pointed out that its call centre is separate and distinct from ESI's call centre, but acknowledged and that there are direct links between them. ECG argued that the direct connect feature provides customers with an expeditious means of contacting ESI's call centre, when they are concerned about problems with heating equipment, instead of the unnecessary inconvenience of making another phone call.

4.5.7 ECG advised that Board that of the total of 18 "stops" in the initial two layers of ECG's Interactive Voice System (IVR) only 3 routed customers to ESI's call centre. Customers who reached these steps in the IVR system were presumably calling in relation to one of the retail or service businesses that ECG transferred to ESI. In

other words, the IVR system routed customers to the retail or service business they were presumably trying to reach.

4.5.8 ECG stated that its "no-abandonment" principle for the customer communication plan included, in the case of the IVR system, the direct connect feature. The feature provided customers with an expeditious means of contacting ESI's call centre, when they were concerned about problems with heating equipment, instead of the unnecessary inconvenience of making another telephone call.

4.5.9 HVAC expressed concern that the complex call centre protocols resulting from the combined ECG/ESI "option menus" for callers to the ECG phone numbers are not only obfuscating the distinction between utility and affiliate, but are preventing utility customers from getting the utility services that they need.

4.6 MISCELLANEOUS OTHER MATTERS

4.6.1 HVAC has raised a number of additional concerns, including the following:

- in at least one reported instance, ESI used an old ECG rental form;
- technicians responding on behalf of ECG to calls to the utility are, in fact, preferentially endorsing and directing customers to ESI;
- technicians are misrepresenting that only "Enbridge" can re-start repaired furnaces;
- in some instances technicians are directing customers without even the customers knowing until ESI technicians arrive at their homes; and
- ESI technicians have been wearing ECG badges out in the field.

4.6.2 ESI admitted that there was a transition period during which certain ESI districts used printed ECG furnace rental forms but that it has now printed its own forms. ESI acknowledged that ESI technicians may have been temporarily wearing ECG badges following the unbundling transaction, but this has subsequently been corrected.

4.7 BOARD FINDINGS ON THE HVAC COMPLAINT

4.7.1 The Code has two principal objectives: first to ensure that in the long term the actions of a regulated monopoly do not frustrate the operation of a competitive market; and secondly to ensure that utility ratepayers are not harmed.

4.7.2 While much of the argument in this proceeding has dealt with the first objective, the operation of the competitive market, the Board is also cognizant of the second objective, no harm to ratepayers. The Board believes that theses two objectives are intertwined. The Board recognizes that in this particular case ECG's customers, who were transferred to ESI, are also ratepayers of ECG. Therefore in the long run, it is in the interests of utility ratepayers that competitive markets operate openly and freely without undue influence from monopoly utilities.

4.7.3 Ensuring that the regulated utility does not abuse its dominant position in financial matters, such as ensuring that ratepayers are charged just and reasonable rates and that utility operations do not financially cross-subsidize their competitive affiliates, is properly the subject of the rate hearing process. However, the rate hearing process may not adequately address the potential damage that can be done to competitors of the utility's affiliate as a result of cross-subsidization. In addition, ensuring that the regulated utility does not abuse its dominant position with respect to non-monetary matters, such as preferentially endorsing a competitive affiliate or misleading or confusing the consumers, is properly the subject of compliance with the Code.

4.7.4 The Board acknowledges that ECG has the right to organize its financial affairs in an efficacious manner and to contract with ECS to perform customer care services, including billing and the operation of the call centre. However, the Board is not convinced by ECG's argument that because it has contracted with its affiliate, ECS, to perform the customer care services, it is absolved of responsibility to comply with the Code. This argument is particularly weak when the Board considers that ECG and ECS are affiliates, each controlled by the same parent, Enbridge Inc.

Use of Enbridge Name and Logo

4.7.5 While section 2.5.3 the Code does not prohibit a regulated utility and its unregulated competitive affiliate from using the same or similar name, logo or other distinguishing characteristics, it does seek to ensure that such use by the utility does not mislead consumers as to the distinction between the utility and its affiliate.

4.7.6 The Board recognizes that Enbridge Inc. is free to organize its business activities in a manner that best suits the overall business purposes of the "Enbridge" group of companies and there may be valid business reasons why ownership of intellectual property rights is vested in Enbridge Inc. However, the Board does not accept ECG's argument that it has no control over the use of the "Enbridge" name and swirled "e" energy spiral and so ECG has not breached the Code. In the Board's view, which legal entity among the "Enbridge" group of companies actually has legal ownership of the "Enbridge" name and swirled "e" energy spiral logo is not determinative of whether there has been a breach of section 2.5.3 of the Code.

4.7.7 A fundamental purpose of this provision of the Code and one of the Board's primary concerns is that customers are not misled as to the distinction between the regulated utility and its unregulated affiliate. The Board notes that the legal name of the utility is "The Consumers' Gas Company Ltd." and that "Enbridge Consumers Gas" is merely a trade name. The utility is not required to use this trade name, nor the "Enbridge" trademark and logo particularly if such use is in breach of the Code.

4.7.8 The Code requires the utility to "take all reasonable steps" to ensure that its competitive affiliate does not use the utility's name, logo or other distinguishing characteristics in a manner that would confuse consumers as to the distinction between the utility and the affiliate. The Board agrees with HVAC that ECG has not demonstrated to the Board's satisfaction that is has taken all reasonable steps to deal with the Board's ultimate concern, which is customer confusion.

Customer Communications

4.7.9 The Board recognizes that there is a fine line between stating, on one hand, the fact that ECG and ESI are affiliated companies and that the rental and other services businesses have been transferred to ESI and, on the other hand, ECG preferentially endorsing the services of ESI. The former is permissible; the latter is not.

4.7.10 The Board accepts ESI's position that it has purchased the assets of ECG's service and rental businesses, including goodwill, as a going concern and that goodwill includes the customer relationships associated with those businesses. Consequently, ESI is entitled to establish its own independent relationship with these customers. However, the concept of goodwill does not necessarily include the ongoing preferential endorsement by the vendor of the business activities of the purchaser. This is particularly true when the vendor is a regulated utility and such preferential

endorsement is contrary to the Code. In addition, ESI was aware of the provisions of the Code when it purchased the assets of ECG's service and rental businesses.

4.7.11 While the Board is sympathetic to ECG's concerns that its rental and service customers should not feel "abandoned' during the transition period, it has now been over one year since the unbundling took place. In the Board's view this has been more than sufficient time for ECG to communicate the fact to its customers that the businesses have been transferred and for ESI to establish its own independent relationship with these customers.

The Gas Bill

4.7.12 The Board finds that the gas bill is not "utility service" because it is not a service "provided by a utility for which a regulated rate, charge, or range rate has been approved by the Board". Therefore there is no obligation under the Code for ECG to afford HVAC members with access to the ECG bill.

4.7.13 The Board recognizes that during the transition there may have been isolated incidents of ECS using ECG's inventory of mailing and return envelopes which may be a technical violation of the Code.

4.7.14 The Board agrees with HVAC that the way the gas bill is printed under the "Enbridge" umbrella obfuscates rather than clarifies the distinction between the ECG and ESI. The gas bill does not clearly delineate the services performed by the utility from the competitive services of its affiliate.

Call Centre

4.7.15 The Board understands ECG's desire to be helpful to customers who have mistakenly called ECG rather than ESI. However, directly linking these customers to ESI to save them the inconvenience of making an additional call, is not sufficient reason alone to mitigate the potential customer confusion and perceived preferential endorsement of the activities of ESI that this direct link provides.

4.7.16 It is critical that the operations of ECG and ESI be separate and distinct from the customer's perspective. While the Board understands that there may have been some initial confusion during the unbundling process, ECG has had ample opportunity over the past year to advise its customers of the transfer of the rental and services business to ESI; therefore the number of calls intended for ESI and misdirected to ECG should be minimal.

Miscellaneous Other Matters

4.7.17 The Board acknowledges that there may have been other miscellaneous breaches of the Code but considers them to be minor transgressions of a temporary nature during the unbundling transition.

Relief

4.7.18 Based on the evidence, the Board shares HVAC's concerns that ECG has engaged in a course of conduct the cumulative effect of which has resulted in the preferential endorsement and support the marketing activities of ESI and has implied to consumers ECG's preference for its affiliate, ESI.

4.7.19 In particular the Board agrees with HVAC that ECG has not taken all reasonable steps to ensure that ESI's use of the "Enbridge" name and logo do not mislead customers as to the distinction between the ECG and ESI, and that the effect of all of ECG's customer communications, including the gas bill and the call centre, both individual and cumulative, is that ECG has preferentially endorsed and supported the marketing activities of ESI and has implied to consumers a preference for ESI.

4.7.20 However, the Board is concerned that the relief requested by HVAC is over reaching and may not be necessary. The Board is reluctant to micro-manage ECG's business and is concerned that if it were to grant the relief requested by HVAC it would be doing just that. For example, the Board has neither the inclination nor the resources to review ECG's customer communications plan nor oversee a Code compliance review at this time.

4.7.21 This does not mean that the Board does not have concerns regarding the actions taken by ECG, but the Board is willing to initially give ECG some flexibility in managing the transition.

4.7.22 The Board notes that this is the first time that the Board has been asked to adjudicate a complaint under the Code. Therefore, rather than imposing a remedy at this time, the Board will set out the actions which it expects ECG to take to come into compliance with the Code.

4.7.23 ECG should make sure that, in all customer communications, ECG's identity and services are separately set out from those provided by other members of the "Enbridge" family. ECG should use its complete trade name, Enbridge Consumers Gas, and should not use the name "Enbridge" alone. ECG can always use its legal name, The Consumers' Gas Company Ltd.

4.7.24 The Board is concerned that the gas bill does not clearly delineate the regulated gas utility service performed by ECG and the competitive services performed by ESI. In particular, ECG should segregate the following information from all other items on the bill gas:

- a specific statement that the regulated services are performed by Enbridge Consumers Gas and not merely Enbridge;
- the exact nature of the services performed by ECG;
- the charges associated with the services performed by ECG; and
- a separate telephone number for customers to call for bill enquiry and service information for ECG.

The Board will not require ECG to bill separately from ESI at this time.

4.7.25 ECG's IVR call centre should no longer automatically link service inquiries directly to ESI. The Board is confident that if ECG clearly sets out the distinction between the regulated services of ECG from those of its competitive affiliates in all customer communications, including the gas bill, the number of truly misdirected calls will be minimal.

4.7.26 The Board is confident that ECG will take all necessary action to address the concerns raised by the Board within the next 60 days. The Board directs ECG to file with the Board and serve on all intervenors of record a report outlining the actions ECG has taken to reflect this Decision. If ECG fails to take such action, the Board will have to consider additional remedies that are available to the Board.

5. COST AWARDS

5.1 COST AWARDS

5.1.1 Parties eligible for a cost award shall file their cost claims by November 7, 2000. The Board will issue its decision on cost awards in due course.

5.1.2 The Board's costs shall be paid by Enbridge Consumers Gas upon receipt of the Board's invoice.

DATED at Toronto October 23, 2000

_____
Sheila K. Halladay
Presiding Member

_____
George A. Dominy
Vice Chair and Member